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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1999

MILOS J JIRICKO MD — PETITIONER

v.

MOSER & MARSALEK PC — RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES APPEALS COURT FOR EIGHTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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RP

QUESTION PRESENTED

Whether, the United States citizen's Constitutional rights to due process of law and,

Whether, the direct written mandate of the United States Supreme Court and the Federal Rules of Civil Procedure may be bypassed without the Supreme Court intervention.

TABLE OF CONTENTS

PETITIONER'S REPLY TO BRIEF IN OPPOSITION.....1

CONCLUSION 7

TABLE OF AUTHORITIES CITED

United States Constitution

Federal Rules of Civil Procedure

Moores Federal Practice

American Jurisprudence 2d

CASES:

Carey v. Piphus, 435 U.S. 247 2

Duncan v. Louisiana, 391 U.S. 170 1

Foye v. United A.G. Stores Coop., 336 F. Supp. 82 3

Hanna v. Plumer; 380 U.S. 450 1

In Re Murchison, 349 U.S.136 6

Johnson v. Zerbst, 304 U.S. 45 4

Palmer at al v. Hoffman, 318 U.S. 109 3

Somerville v. J.C.Hall, 2 F3d 1564 6

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

I, the Petitioner, have received the 'Respondent's Brief in Opposition' on October 27th 1999, p.m. I respectfully submit this reply to demonstrate that the respondent's 'Brief in Opposition' has not been filed in order to promote the administration of justice but only **to avoid the justice**.

The Respondent is frankly contemptuous by suggesting that..."This issue"... violation of due process and violation of the Federal Rules of Civ. Procedure "is simply not one for which this Court should exercise its discretion"; [Respondent Brief at 6].

The Supreme Court declared that the purpose of Court Rules is to insure uniformity and timely adjudication;
[Duncan v. Louisiana, 391 U.S. 170];
[Hanna v. Plumer, 380 U.S.450].

Such judgment is then clearly trivialized by the respondent's notion that they can blatantly disregard the Rules and the Rules specific terms at their whim while hiding behind a plethoric verbiage. The Supreme Court has precisely ordered a procedure to be followed and there is absolutely no doubt that this procedure has been blatantly violated.

Respondent's statement that *"dismissal of Petitioner's Claim in Jiricko IV adhered to all procedural requirements and satisfied Petitioner's Rights to Due Process"* is false; [Respondent Brief at 7]; [Carey v. Piphus, 435 U.S. 247].

i. Federal Rules of Civ. Procedure are authorized by Rules Enabling Act which provides that Supreme Court shall have power to prescribe the forms of process, pleadings and motions; [Hanna v. Plumer, 380 U.S.450]. Hence, ordering the manner in which the claimant is to plead Res Judicata at the United States district courts relates to practice and procedure of the district courts and it is valid and constitutional exercise of the Supreme Court power; [Hanna v. Plumer, 380 U.S. 450].

ii. There is no doubt that F.R.C.P., Rule 12 (b) cited by the respondent does not list in its subdivisions (1) through (6) Res Judicata as the defense available under the Rule 12 (b).

iii. There is no doubt that F.R.C.P., Rule 8 specifically demands that the defense of Res Judicata is submitted by pleading, expressly requiring the claimant either to deny or admit the plaintiff Complaint's allegations.

iv. There is absolutely no doubt that F.R.C.P., Rule 8 is valid procedural rule and that it fully controls the instant case No: 4-98CV01893 CDP; [Palmer v. Hoffman, 318 U.S. 109].

Whether some federal courts erroneously disregarded the F.R.C.P., Rule 8 constitute no mandate of the United States Supreme Court; United States federal courts clearly held:

Federal Civil Procedure 1775. Defense of res judicata could not be raised on motion to dismiss; F.R.C.P., Rule 12(b); [Foye v. United A.G. Stores Coop., 336 F. Supp. 82]

Such ruling is constitutional, jurisdictional and logical.

"COMES NOW defendants Moser & Marsalek PC and for its Motion to dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12 (B)"...; [Petitioner's Brief at 8].

The defendants' motion to dismiss is self-explanatory.

Constitution Art III and 28 U.S.C. & 1332 limit the federal court jurisdiction only to cases or controversies. Thus, for the federal court to rule upon a new issue..."**in addition**" to the perimeter of the defenses strictly enumerated by the F.R.C.P., Rule 12 (b), that is whether plaintiff's complaint No: 4-98CV01893 CDP may be barred by the doctrine of Res

Judicata without the requisite pleading submitted by the claimant under the Rule 8 disputing or confessing the allegations of the Complaint - federal court would have to usurp the jurisdiction to do so; [Constitution Art III; 28 U.S.C. & 1332; Johnson v. Zerbst, 304 U.S. 45]. Petitioner respectfully evidenced in his submissions that granting the Res Judicata upon his Complaint No: 4-98CV01893 CDP infringed upon the plaintiff's substantial and procedural due process of law and that it is unconstitutional.

v. "The Respondents filed a detailed motion to dismiss delineating why the Petitioner's claims were barred. The motion was accompanied by the pleadings, orders and opinions from the prior cases",....[Respondent's Brief at 9].

In its motion to dismiss, defendant argues that plaintiff's complaint is barred by res judicata; [Exhibit B].

A motion to dismiss is properly treated as a motion for summary judgment under F.R.C.P., Rule 56 where, in order to decide the motion, the trial court must consider documents submitted in support of the motion as well as the pleadings; [61 Am Jur 2d at 590].

vi. There is no doubt that the respondent himself fully evidenced before the Supreme Court that their motion to dismiss originally filed by the defendants under the Rule 12 (b)

was definitely converted into the motion for summary judgment by the court; F.R.C.P., Rule 12 (b) & Rule 56; [Appendix B]; [American Jurisprudence 2d].

vii. Here, however, the defendants have filed no requisite pleading confessing to the facts, a cause of action pleaded in the Complaint No: 4-98CV01893 CDP and failed to properly plead the affirmative defense of avoidance including the issue of material facts applicable under the F.R.C.P.,Rule 56

Here, the procedural safeguards due to the plaintiff pro se were only further and severely disregarded.

Our jurisprudence requires at least this; that an adverse party be given express, ten day notice of the summary judgment rules, of his right to file affidavit or other materials in opposition to the motion and of the consequence of default; [Somerville v. J. C. Hall, 2 F3d 1564].

Here, **No Notice,** requisite under the F.R.C.P., Rule 12 (d) and F.R.C.P., Rule 56 has ever been furnished to the plaintiff and the district court acted in biased manner.

Clearly, while the Court favorably overlooked the Federal Rules applicable to the defendants, the court then ignored the federal procedural safeguards and the plaintiff's due process of

law rights and further, sua sponte applied the very same rules it disdained, as a sword to punish and to ostracize this innocent litigant pro se [Appendix B].

[o]ur system of law has always endeavored to prevent even the probability of unfairness;
[In Re Murchison, 349 U.S.136].

In conclusion, it is wholly evident that the full jurisdiction of the United States Supreme Court only brightly shines here. This Petitioner pro se has the absolute right to rely upon the United States Supreme Court written declaration.

Res Judicata upon the case No: 4-98CV01893 CDP is not constitutionally available. The Supreme Court of the United States ruling of the F.R.C.P., Rule 8 motion is a valid federal rule and to bypass the Federal Rules of Civil Procedure or the litigant's pro se due process of law will not be tolerated by the Supreme Court of the United States. Respondent by his own 'Brief in Opposition' only further evidenced before the Supreme Court the compelling need of the United States Supreme Court's action.

I, the Petitioner, most respectfully pray that the Supreme Court grant Certiorari to review the issues.

Respectfully Submitted.

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